

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MAURICE J. ADAMS,

Defendant-Appellee.

UNPUBLISHED

July 22, 2004

No. 245550

Wayne Circuit Court

LC No. 02-004931

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HAROLD S. VARNER,

Defendant-Appellee.

No. 245557

Wayne Circuit Court

LC No. 02-001389

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, the prosecution appeals as of right from orders dismissing charges of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b, against defendants, whose cases were consolidated for trial below. The trial court struck the prosecution's witness list, and then dismissed the cases with prejudice, because the prosecution failed to file the witness list in a timely manner as required by statute and by an order of the court. We reverse and remand.

It is undisputed that the prosecution failed to comply with the timeliness requirements for filing a witness list under MCL 767.40a and failed to comply with an independent order by the trial court to file its witness list. The prosecution admits that some remedy may be appropriate but argues that the extreme nature of striking the entire witness list and dismissing the case was inappropriate. This Court reviews a trial court's imposition of sanctions for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). An abuse of discretion in a criminal case "occurs when the lower court's decision is 'so palpably and grossly violative of fact and logic that it evidences not

the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *People v Yost*, 468 Mich 122, 126-127; 659 NW2d 604 (2003), citing *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

The underlying purpose of MCL 767.40a is to provide notice to the accused of potential witnesses. *People v Callon*, 256 Mich App 312, 327; 662 NW2d 501 (2003). The statute is not intended to bar admission of relevant evidence or to allow a defendant to engage in “gamesmanship.” *Id.* at 327-328. However, the statute is intended to prevent unfair prejudice to a defendant. *Id.* at 328-329. Therefore, noncompliance with the statute does not require dismissal if the defendant is not prejudiced. *People v Williams*, 188 Mich App 54, 58-60; 469 NW2d 4 (1991). However, if a defendant *can* show prejudice as a result of the witness list violation, a trial court abuses its discretion by allowing the noncompliance without imposing sanctions. See, generally, *Callon*, *supra* at 328-329. Overall, a trial court is required to fairly balance “the interests of the courts, the public, and the parties” and should exclude otherwise-admissible evidence “only in the most egregious cases.” *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987).

Although the parties and the trial court extensively discussed the prosecution’s reasons for failing to comply with the pertinent rules, the most relevant inquiry, which was not undertaken by the trial court, is the extent to which defendants were prejudiced by the prosecution’s noncompliance. See *Taylor*, *supra* at 486-487. The record does not support the conclusion that the prosecution deliberately avoided complying and, in the absence of prejudice to a defendant, “[m]ere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved.” *Callon*, *supra* at 328. Therefore, because the prosecutor concededly failed to comply but apparently did not do so willfully, dismissal would only be warranted if defendants were prejudiced by the noncompliance. If defendants were prejudiced, dismissal was within the trial court’s discretion; if defendants were not prejudiced, dismissal was an abuse of discretion. “Prejudiced,” in this context, means a party’s having been hindered in his ability to prepare his case or to test the evidence. See *Taylor*, *supra* at 486-487.

The record shows that the trial court did not sufficiently inquire into the prejudice to defendants. Instead, the trial court focused on the reasons its order and the statute had not been complied with. The only indication that defendants actually *were* prejudiced comes from conclusory statements in defendants’ motion to strike and conclusory statements made by the trial court. On the basis of the present record, it is impossible to determine what prejudice, if any, defendants suffered. In the absence of a showing that defendants were prejudiced, striking the witness list entirely was unwarranted. Therefore, the trial court abused its discretion in the manner in which it addressed the prosecution’s noncompliance.

The prosecution concedes that some remedy may be appropriate. Therefore, although the charges against defendants must be reinstated, defendants should receive an evidentiary hearing to determine an appropriate remedy.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper